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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JASON MOH,

Cross-complainant and Appellant,

v.

EVGA.COM CORP et al.,

Cross-defendants and Respondents.

B161913

(Super. Ct. No. KC038418)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Conrad Aragon, Judge. Reversed and remanded.

Jayne T. Kaplan for Cross-complainant and Appellant.

Law Offices of Roger C. Hsu, Roger C. Hsu and Vincent Chan for Cross-  
defendants and Respondents.

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EVGA.com Corp. sued its former employee, Jason Moh, for misappropriation of trade secrets and breach of a non-compete agreement, among other things. Moh filed a cross-action against eVGA.com Corp. and its president, alleging several causes of action, including interference with contract and unfair business practice. Cross-defendants

demurred to the cross-complaint on the ground all of Moh's claims are barred by the litigation privilege. The trial court sustained the demurrer without leave to amend. We conclude two of the five causes of action in the cross-complaint are not barred by the litigation privilege and allege an actionable controversy between the parties. Accordingly, we reverse and remand the matter.

## FACTS AND PROCEEDINGS BELOW

EVGA.com Corp.'s complaint asserts 11 causes of action against its former employee, Jason Moh, including misappropriation of trade secrets and breach of a non-compete agreement. The complaint also asserts eight causes of action against Moh's subsequent employer, MSI Computer Corporation (MSI), an alleged competitor of eVGA.com Corp. In substance, the complaint alleges as follows:

EVGA.com Corp. "is engaged in the fabrication, design, manufacturing, marketing, and sales of video graphics adapters . . . ." In his position as executive sales manager at eVGA.com Corp., Moh signed a non-compete agreement, acknowledging his "duty to protect [eVGA.com Corp.]'s business secrets," including its customer list and information about the marketing and pricing of its products. Moh violated the agreement when he disclosed some or all of eVGA.com Corp.'s business secrets to MSI. Moh and MSI used the business secrets to compete with eVGA.com Corp.

Moh cross-complained against eVGA.com Corp. and its president, Andrew Han. The cross-complaint alleges as follows:

Moh had spent 10 years working in the computer industry before eVGA.com Corp. hired him. During those years he had "become familiar with many purchasers in the computer industry, as well as sales techniques, and pricing structure." Moh worked for eVGA.com Corp. from January 2001 through January 2002.

On February 1, 2002, Moh began his employment with MSI. The day before his employment commenced, eVGA.com Corp. told Moh and MSI it would sue them if Moh

went to work for MSI. EVGA.com Corp. claimed “a non-competition agreement prohibited Moh’s employment in the computer industry for a period of one year.”

The first cause of action for interference with contract alleges “[t]he threatened litigation and the litigation are not justifiable” because (1) “California law prohibits interference with employment or livelihood”; and (2) “Moh had obtained no trade secrets from [eVGA.com Corp.] and Moh’s position with MSI involved totally difference [sic] products than those sold by [eVGA.com Corp.]” Moh alleges, because of the “interference” -- i.e., the threatened litigation and the litigation -- he “was unable to adequately perform duties with MSI in an effective manner and lost his employment.”

The second cause of action for interference with prospective business advantage is based essentially on the same allegations as the first cause of action. Moh alleges the litigation interfered with his “livelihood and ability to find employment suitable to his experience and skill.” He also alleges [t]he threatened litigation and the litigation are not justifiable and violate Business and Professions Code [section] 17200” because (1) “Moh is in possession of no information obtained from [eVGA.com Corp.] that constitutes a trade secrets [sic]”; and (2) eVGA.com Corp., “through litigation and correspondence in violation of California law, seeks to prohibit Moh’s employment with any competitor for a period of one year.”

The third cause of action for violation of Business and Professions Code section 17200 alleges eVGA.com Corp. “has or intends to prohibit employees from seeking employment with other companies in the computer industry by erroneously claiming that they are in possession of trade secrets and by utilizing unenforceable non-competition agreements.” Moh alleges eVGA.com Corp.’s interference “with the livelihood of Moh and other employees is an unfair business practice prohibited by Business and Professions Code [section] 17200.”

The fourth cause of action for intentional infliction of emotional distress is based on the actions of eVGA.com Corp. and Han alleged in the first three causes of action. In his fifth cause of action for injunctive relief, Moh seeks to enjoin eVGA.com Corp. and Han from interfering with his livelihood.

EVGA.com Corp. and Han demurred to the cross-complaint on the ground all of Moh's claims are barred by the litigation privilege.<sup>1</sup> The trial court agreed with their position and sustained the demurrer without leave to amend, over Moh's objection.

According to the parties' representations, eVGA.com Corp. dismissed its complaint against Moh without prejudice a few months after Moh filed this appeal.<sup>2</sup>

## DISCUSSION

### I. STANDARD OF REVIEW.

In reviewing an order sustaining a demurrer, we accept as true the properly pleaded factual allegations of the complaint and consider matters which may be judicially noticed.<sup>3</sup> The allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties.<sup>4</sup> We review the complaint de novo to determine whether the trial court erred in sustaining the demurrer.<sup>5</sup>

When a trial court sustains a demurrer *without leave to amend*, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.”<sup>6</sup>

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<sup>1</sup> Civil Code section 47, subdivision (b)(2).

<sup>2</sup> After it dismissed its complaint as to Moh, eVGA.com Corp. withdrew its motion to dismiss this appeal. The motion was based on the fact the underlying action between Moh and eVGA.com Corp. was still pending.

<sup>3</sup> *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 746; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

<sup>4</sup> Code of Civil Procedure section 452; *King v. Central Bank* (1977) 18 Cal.3d 840, 843.

<sup>5</sup> *Cantu v. Resolution Trust Corporation* (1992) 4 Cal.App.4th 857, 879.

<sup>6</sup> *Blank v. Kirwan*, *supra*, 39 Cal.3d at page 318.

II. MOH’S CAUSES OF ACTION FOR INTERFERENCE WITH CONTRACT AND INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE ARE BARRED BY THE LITIGATION PRIVILEGE.

Moh contends the litigation privilege is inapplicable to the claims in his cross-complaint. In the alternative, he argues, even if the privilege is applicable, we should reinstate his cross-complaint because his constitutional “right to earn a living”<sup>7</sup> trumps the litigation privilege.

Under Civil Code section 47, subdivision (b)(2), a “publication or broadcast” made in any “judicial proceeding” is privileged. As the Supreme Court has made clear, this so-called litigation privilege is “applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution.”<sup>8</sup>

A communication is privileged when it is “(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that ha[s] some connection or logical relation to the action.”<sup>9</sup> A communication made before litigation commences is privileged so long as it has “some relation to an imminent lawsuit or judicial proceeding which is *actually* contemplated seriously and in good faith to resolve a dispute, and not simply as a tactical ploy to negotiate a bargain.”<sup>10</sup>

“Given the importance to our justice system of encouraging free access to the courts, promoting complete and truthful testimony, encouraging zealous advocacy, giving finality to judgments, and avoiding unending litigation, it is not surprising that . . . the litigation privilege[] has been referred to as ‘the backbone to an effective and smoothly

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<sup>7</sup> Moh cites article I, section 1 of the California Constitution.

<sup>8</sup> *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.

<sup>9</sup> *Silberg v. Anderson, supra*, 50 Cal.3d at page 212.

<sup>10</sup> *Edwards v. Centex Real Estate Corporation* (1997) 53 Cal.App.4th 15, 36.

operating judicial system.”<sup>11</sup> “Any doubt about whether the privilege applies is resolved in favor of applying it.”<sup>12</sup>

Moh’s first and second causes of action for interference with contract and interference with prospective business advantage are based on the fact eVGA.com Corp. threatened to sue Moh and his new employer, and then made good on the threat. No other conduct by eVGA.com Corp. or Han forms the basis for these causes of action. We agree with the trial court’s conclusion these causes of action are barred by the litigation privilege.

Moh concedes the litigation privilege applies to “statements made in litigation.” Yet he argues the privilege does not cover the “conduct” alleged in his first and second causes of action. Moh’s position is patently without merit. The only conduct alleged in these causes of action falls squarely within the privilege: eVGA.com Corp. told Moh and his new employer it planned to sue them and it did.<sup>13</sup> The threat of a lawsuit and the pleadings filed in the lawsuit constitute privileged communications within the meaning of section 47, subdivision (b)(2).<sup>14</sup> Moh’s discussion about the merits of eVGA.com Corp.’s

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<sup>11</sup> *Silberg v. Anderson, supra*, 50 Cal.3d at pages 214-215.

<sup>12</sup> *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913.

<sup>13</sup> The cases Moh relies on are inapplicable to the allegations in his first and second causes of action. For example, in *Kimmel v. Goland* (1990) 51 Cal.3d 202, the Supreme Court held the litigation privilege does not bar an action “involving noncommunicative acts – the illegal recording of confidential telephone conversations – for the purpose of gathering evidence to be used in future litigation.” (51 Cal.3d at p. 205.) In *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, the Supreme Court held the litigation privilege does not bar an action in which a doctor challenged the revocation of her staff privileges at a hospital, even though the “decision to revoke [her] staff privileges emanated from a quasi-judicial proceeding.” (17 Cal.3d at pp. 481, 482.)

In his first and second causes of action, Moh does not allege any noncommunicative or nonprivileged conduct. These causes of action are based entirely on eVGA.com Corp.’s threat of litigation and its filing and maintaining of the litigation.

<sup>14</sup> Moh cites *Herzog v. “A” Company, Inc.* (1982) 138 Cal.App.3d 656 for the proposition “a communication not related to a potential judicial action contemplated for legitimate purposes is not protected by the [litigation] privilege . . . .” (138 Cal.App.3d at page 662.) In that case, the Court of Appeal found the litigation privilege did not apply

lawsuit is irrelevant to this analysis. The privilege applies to communications made and pleadings filed in meritless actions.<sup>15</sup>

Moh asserts his right to earn a living outweighs the policies supporting the litigation privilege. In support of this argument, he cites *Jeffrey H. v. Imai, Tadlock & Keeney*.<sup>16</sup> There, the plaintiff brought an action against a law firm and some of its employees for invasion of the constitutional right of privacy and other claims. The complaint alleged the law firm had gained access to his confidential medical records in an underlying personal injury action and had improperly disclosed the results of his HIV tests to an arbitrator.<sup>17</sup> The law firm had represented the plaintiff's opponents in the underlying action. The trial court sustained the defendants' demurrer without leave to amend and dismissed the action.

The Court of Appeal reversed the judgment as to the invasion of privacy cause of action and otherwise affirmed. The court found "the amended complaint allege[d] a willful and unnecessary disclosure of constitutionally protected information . . . ."<sup>18</sup> Engaging in a "balancing of interests analysis," the court "conclude[d] that the constitutional right to privacy outweighs the policies underlying the litigation privilege . . . ."<sup>19</sup> The court emphasized its conclusion was "[b]ased solely upon [the] allegations

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to a pre-litigation communication in which the defendant, the plaintiff's former employer, threatened to sue the plaintiff and his subsequent employer if he went to work for a competitor, based on an agreement between the parties. The defendant never sued the plaintiff.

This case is distinguishable from *Herzog* because eVGA.com Corp. did not make a mere hollow threat of litigation. It went ahead and sued Moh. There is no doubt the litigation privilege applies to the pleadings filed in this litigation. It would make no sense to find the privilege does not also cover the threat to file this same litigation.

<sup>15</sup> *Kashian v. Harriman*, *supra*, 98 Cal.App.4th at pages 917, 920.

<sup>16</sup> *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345.

<sup>17</sup> *Jeffrey H. v. Imai, Tadlock & Keeney*, *supra*, 85 Cal.App.4th at pages 350-351.

<sup>18</sup> *Jeffrey H. v. Imai, Tadlock & Keeney*, *supra*, 85 Cal.App.4th at page 360.

<sup>19</sup> *Jeffrey H. v. Imai, Tadlock & Keeney*, *supra*, 85 Cal.App.4th at pages 360-361.

[in the amended complaint].”<sup>20</sup> The court held the litigation privilege barred the plaintiff’s causes of action for intentional and negligent infliction of emotional distress.<sup>21</sup>

Moh’s cross-complaint does not allege any violation of his constitutional rights. We would not reverse the judgment in any event, even if Moh could amend to state a claim under the California Constitution. The *Jeffrey H.* case involves a particular constitutional violation -- invasion of privacy -- and a particular fact pattern -- arising out of “a willful and unnecessary disclosure of constitutionally protected information.”<sup>22</sup> We decline to extend *Jeffrey H.* to the facts of this case. Accepting all of Moh’s allegations as true, as we must in reviewing his cross-complaint, it is clear he failed to allege an invasion of his constitutional right to privacy or any other right which would outweigh the policies supporting the litigation privilege.

The trial court properly concluded Moh’s first and second causes of action for interference with contract and interference with prospective business advantage are barred by the litigation privilege. To the extent the fourth cause of action for intentional infliction of emotional distress is based on the allegations in the first and second causes of action, it too is barred.

For the reasons set forth below, however, we conclude the trial court erred when it determined the other claims in the cross-complaint are barred by the litigation privilege.

III. THE TRIAL COURT IMPROPERLY SUSTAINED THE DEMURRER AS TO THE CAUSES OF ACTION FOR VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200 AND INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS.

Moh’s third cause of action for violation of Business and Professions Code section 17200 is not based on the threatened litigation or the litigation. Nor is it based on any communicative conduct covered by the litigation privilege. Instead, this cause of action

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<sup>20</sup> *Jeffrey H. v. Imai, Tadlock & Keeney, supra*, 85 Cal.App.4th at page 360.

<sup>21</sup> *Jeffrey H. v. Imai, Tadlock & Keeney, supra*, 85 Cal.App.4th at page 361.

<sup>22</sup> *Jeffrey H. v. Imai, Tadlock & Keeney, supra*, 85 Cal.App.4th at page 360.



challenges the enforceability of the non-compete agreement and certain business practices of eVGA.com Corp. Moh's fifth cause of action for injunctive relief, aside from seeking to enjoin eVGA.com Corp. from pursuing this litigation, also seeks to enjoin it from enforcing the non-compete agreement.

The trial court erred when it decided the third and fifth causes of action in the cross-complaint are barred in their entirety by the litigation privilege. Moreover, to the extent Moh's fourth cause of action for intentional infliction of emotional distress is based on the conduct alleged in the third cause of action, it is not barred by this privilege either.

Although the fifth cause of action for injunctive relief is not barred by the litigation privilege, we affirm the trial court's decision to sustain the demurrer without leave to amend as to this cause of action because it is moot. In his fifth cause of action, Moh seeks to prevent eVGA.com Corp. from enforcing the non-compete agreement against him. As Moh concedes, however, the non-compete agreement had a one-year term.<sup>23</sup> It expired while this appeal was pending. Because eVGA.com Corp. cannot use the non-compete agreement to prevent Moh from obtaining new employment, there is no longer any basis for Moh's fifth cause of action.

The expiration of the non-compete agreement does not render moot Moh's third or fourth cause of action, however. Moh may seek relief under Business and Professions Code section 17200 on behalf of himself and others for eVGA.com Corp.'s alleged unfair business practices.<sup>24</sup> Moh also may pursue his claim for intentional infliction of emotional distress to the extent it is not based on conduct alleged in his now defunct first and second causes of action. Accordingly, Moh may base his emotional distress claim on the allegation eVGA.com Corp. prohibited him "from seeking employment with other

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<sup>23</sup> Although the non-compete agreement apparently is an exhibit to the complaint, it was not included in the Clerk's Transcript on appeal.

<sup>24</sup> Business and Professions Code section 17204 (action under section 17200 may be brought "by any person . . . acting for the interests of itself, its members or the general public").

companies in the computer industry by erroneously claiming that [he was] in possession of trade secrets and by utilizing [an] unenforceable non-competition agreement[.]”

For the foregoing reasons, we conclude the trial court erred when it sustained the demurrer as to the third and fourth causes of action in Moh’s cross-complaint.

#### DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion. Each party is to bear its own costs on appeal.

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JOHNSON, J.

We concur:

PERLUSS, P.J.

MUNOZ (AURELIO), J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.